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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO ORTIZ,

Defendant and Appellant.

B281675

(Los Angeles County  
Super. Ct. No. YA041328)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Susan L. Jordan, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

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Antonio Ortiz appeals from an order denying his petition under Proposition 47, the Safe Neighborhoods and Schools Act of 2014, to recall his sentence and reclassify his felony convictions for petty theft with priors (Pen. Code, § 666)<sup>1</sup> and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) as misdemeanors. The trial court denied the petition on the ground Ortiz currently poses an unreasonable risk of danger to public safety within the meaning of Penal Code section 1170.18, subdivisions (b) and (c). Ortiz contends the trial court's denial of his petition was an abuse of discretion. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **A. *Ortiz's Criminal History***

#### **1. *Ortiz's 1989 robbery conviction***

On October 30, 1989 Ortiz was arrested and charged with two counts of second degree robbery (§ 211). A 16 year old was seated in the driver's seat of his mother's car when Ortiz approached him and asked if he was looking at Ortiz and did he "have a problem" with him. Ortiz hit the young man on the left side of his head and pulled a chain necklace off his neck. Ortiz climbed into the car, then followed the young man out of the car and jumped on his back. Two of Ortiz's friends arrived and one of them broke up the fight. Ortiz pleaded guilty to one count of second degree robbery and was sentenced to two years in prison.

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<sup>1</sup> Undesignated statutory references are to the Penal Code unless otherwise undicated.

## 2. *Ortiz's 1993 robbery conviction*

On August 30, 1993 Ortiz was arrested and later charged with second degree robbery under the name Antonio Lopez. On that date a prostitute took a man to a motel room, where Ortiz was waiting. Ortiz beat the man and removed his watch. The man fought back, and Ortiz struck him with a curtain rod. Los Angeles County Sheriff's deputies responded to the hotel room, and saw the man run out of the room, followed by Ortiz. Ortiz was detained, and the officers recovered the man's watch from Ortiz's pocket. The man's face was red and slightly swollen. Ortiz pleaded guilty to the robbery and was placed on three years' probation on the condition he serve 180 days in county jail.<sup>2</sup>

## 3. *Ortiz's 1998 parole violation*

According to a report to the Board of Prison Terms, on May 4, 1998 Ortiz's former girlfriend observed him sleeping in her parked car and asked him to leave. Instead of leaving, Ortiz followed the ex-girlfriend into her residence. Ortiz ignored the ex-girlfriend's repeated requests to leave, grabbed her hair, dragged her down the hallway towards her bedroom, and "slamm[ed] [her] body into the walls." Ortiz threw the ex-girlfriend on the bed and hit her repeatedly with the palm of his hand, then placed his hand over her mouth and nose in an attempt to suffocate her.

When the ex-girlfriend screamed for help, Ortiz ripped a telephone cord from the wall and used it to tie her hands behind her back. Ortiz also ripped a second telephone cord from the wall. He then took \$200 from a dresser drawer, re-tied the ex-

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<sup>2</sup> Ortiz was sentenced as Antonio Lopez and his sentence appears to reflect his lack of a criminal record under this alias.

girlfriend's hands in front of her, bound her feet with a sheet, and gagged her by forcing a blanket into her mouth. Ortiz took the ex-girlfriend's car keys, left her home, and attempted to start her car.

When Ortiz was unable to start the car, he fled to the neighbors' home and forced his way inside. He grabbed a knife from the kitchen, and demanded the key to the neighbors' vehicle. The neighbors refused, and the wife retrieved a firearm for protection. Ortiz shoved the wife to the floor, took the firearm, and held the neighbors at gunpoint until the police arrived. Ortiz provided the officers false identification, identifying himself as Oscar Hernandez.

Ortiz was arrested the same day for inflicting corporal injury on a former girlfriend, child cruelty, and burglary. Based on his arrest, on May 19, 1998 Ortiz was charged with seven parole violations for illegal entry into the United States, attempted murder, robbery, burglary, possession of a firearm, attempted robbery, and providing false identification to a peace officer. The Board of Prison Terms found good cause to revoke Ortiz's parole on all seven charges. Following a trial, on March 11, 1999 Ortiz was acquitted of robbery, attempted robbery, and first degree burglary, and the charge of inflicting corporal injury on a former girlfriend was dismissed. However, Ortiz was returned to custody for 12 months based on his parole violations.

#### 4. *Ortiz's additional criminal history*

On October 25, 1988 Ortiz was convicted of grand theft from a person (§ 487, subd. (c)) and sentenced to 16 months in prison. Ortiz was released on April 20, 1989, but was arrested on

July 14, 1989 for grand theft auto (§ 487, subd. (d)(1)), receiving stolen property (§ 496, subd. (a)), and providing false identification to peace officers (§ 148.9). He was convicted of all three charges as misdemeanors, and was placed on one-year summary probation on condition he serve 45 days in county jail.

In April 1991 Ortiz was again arrested for grand theft auto. He was not charged, but was violated on his parole and returned to prison to complete his term. In November 1991 Ortiz was arrested for burglary. The charge was later dismissed, but Ortiz was violated on his parole and returned to custody. In July 1994 Ortiz was convicted of receiving stolen property and was sentenced to 32 months in prison.

#### B. *Ortiz's Current Offenses*

On August 1, 1999 Ortiz and a female companion were in a department store in Redondo Beach. Juan Carlos Layva, the store's loss prevention agent, saw Ortiz pick up a black leather belt and place it around his waist. Ortiz and his companion approached the store register and paid for several items, but not the belt, then exited the store. Layva and two other loss prevention agents stopped Ortiz outside the store and arrested him. The agents also detained Ortiz's female companion, who produced receipts for the items she had purchased. Ortiz was taken into custody. The value of the belt was estimated to be \$38.

On August 2, 1999 Priscilla Sena was working in the jail at the Redondo Beach Police Department. She arrived at Ortiz's cell to transport him to court and noticed Ortiz discretely trying to grab a small bound-up piece of plastic on his bed. Ortiz placed the object into his pants pocket, but then dropped the object on

his jail bed as he was about to be searched. A chemical analysis of the substance in the plastic wrapping confirmed the package contained 0.61 grams of a powder containing methamphetamine.

The information charged Ortiz with one count of petty theft with a prior (§§ 484, subd. (a), 666) and possession of a controlled substance, methamphetamine (Health & Saf. Code, § 11377, subd. (a).) The information alleged Ortiz suffered two prior convictions of serious or violent felonies within the meaning of the three strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), and that Ortiz served three prior prison terms within the meaning of section 667.5, subdivision (b). On February 4, 2000 Ortiz pleaded guilty to both counts and admitted the special allegations.

Ortiz moved to dismiss his prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, arguing he pleaded guilty early in the case, expressed remorse to the court, admitted he had a serious drug problem, had strong family and community ties, and had not used weapons in any of his prior crimes. Ortiz's counsel also noted the probation reports for the current offenses recommended he not be sentenced under the three strikes law. The trial court denied the motion, citing Ortiz's failure previously to address his drug problem, his 1998 felony conviction following his strike offenses, and that he was on parole at the time of the current offenses. The trial court sentenced Ortiz to 25 years to life on each count and ordered the sentence on Ortiz's drug possession charge to run concurrent with the sentence on the theft offense.

C. *Ortiz's Prison Record*

While in prison, Ortiz received at least 14 rules violation reports (RVR's).<sup>3</sup>

1. *The 2005 battery on an inmate*

In January 2005 Ortiz was in a fight with another inmate in the prison yard. As the correctional officers approached, Ortiz was holding the inmate in a headlock. Officers broke up the fight and observed the inmate had blood around his upper torso, neck, and facial area, and a cut on his head directly behind his left ear. Ortiz had blood on both hands, his upper and lower torso area, and his left underarm area. A search of the yard revealed a trail of blood stains leading to a weapon consisting of three razor blades held together by a black substance. The inmate had two lacerations on his left earlobe and a laceration behind his left ear, as well as abrasions on his neck and behind his right ear. The lacerations were bleeding. The inmate received 19 stitches and was admitted to inpatient care for further care and observation.

Ortiz was charged with a rules violation for a battery causing serious injury on a victim inmate. Ortiz pleaded guilty, stating, "I didn't slash [the inmate], I battered him." Ortiz was

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<sup>3</sup> "[A]n RVR is issued for a serious rules violation. The California Code of Regulations gives a non-exhaustive list of examples of serious rules violations to include such circumstances as: use of force or violence against another person, a breach of or hazard to facility security, a serious disruption of facility operations, manufacturing a controlled substance, and willfully inciting others to commit an act of force or violence." (*Quiroz v. Horel* (N.D.Cal. 2015) 85 F.Supp.3d 1115, 1143; see Cal. Code Regs., tit. 15, §§ 3312, subd. (a)(3) ["Disciplinary Methods"], 3315, subd. (a) ["Serious Rule Violations"].)

found guilty of the rules violation and was placed in the solitary housing unit for 15 months. The matter was referred to the district attorney's office, which rejected the case for prosecution.

2. *The 2008 razor in Ortiz's cell*

In September 2008, during a random cell search of Ortiz's cell, a correctional officer found a state issued inmate razor in a cup on the upper shelf of the cell. Because inmates are not permitted to keep razors in their cells, Ortiz was charged with a rules violation for possession of dangerous contraband. Ortiz was found not guilty of that charge but pleaded guilty to the lesser charge of possession of contraband. He stated, "I forgot to turn the razor in." Ortiz was assessed with a loss of credit and privileges.

3. *The 2014 battery on an inmate*

On March 1, 2014 a correctional sergeant received confidential information that Ortiz had battered his cellmate on February 27, 2014. The confidential information stated Ortiz hit and kicked the cellmate until he fell to ground, Ortiz rushed him three times, then continued to hit and kick the cellmate in the head. Ortiz then punched the cellmate's television, shattering the screen. Ortiz ordered the cellmate to sit on his bunk and not to tell anyone about the incident. The confidential informant stated Ortiz beat the cellmate to have him moved from his assigned bed so Ortiz could move one of his "homeboys" into the cell. The prison record states that ". . . Ortiz has been documented as being a participant of the STG II gang known as '25s.'"

Ortiz pleaded guilty to the charge of battery on an inmate, stating, “I did get into a fight. I lost my cool and fought back. [The cellmate] got me first. I just lost it twice. I could not take the fact that I got hit. [The cellmate] is a homosexual and he was on me and I don’t want no part of that.” Ortiz was found guilty of the violation and assessed a loss of credit and privileges and assigned additional duties.

#### 4. *Ortiz’s other RVR’s*

Ortiz’s other RVR’s included violations in 2002 for possession of a controlled substance (marijuana); in 2003 for disrespect towards staff (using profanity against correctional officer); in 2003 for possession of tattoo-making paraphernalia; in 2004 and 2015 for possession of inmate-manufactured alcohol; in 2006 and 2010 for disobeying orders (to remove window covering); in 2010 for destruction of state property (making curtains out of sheets); in 2011 for possession of drug paraphernalia (homemade needle and syringe); and in 2013 for refusal to follow orders (leaving cell to play in card game).

#### D. *Evidence of Gang Membership*

According to the probation report prepared for his 1993 robbery charge, Ortiz admitted membership in the Gardena 13 gang, but stated he “got out” in 1989. The August 1999 booking and arrest report for Ortiz’s theft and drug possession offenses lists Ortiz’s gang affiliation as Gardena 13 and describes his gang tattoos, including “Gardena” above his right eyebrow, “LA Gardena XIII” on his abdomen, “Gardena 13” on the back of his neck, and “G 1” on his left leg. In February 2014 Ortiz beat his cellmate to enable one of Ortiz’s “homeboys” to be housed in his

cell. In Ortiz's July 2005 prison program review, Ortiz's gang affiliation was listed as Gardena 13, although Ortiz stated to the correctional officer he had been targeted for assault "and wants out of the gang." A July 2014 prison threat assessment similarly lists Ortiz's gang affiliation as Gardena 13.

Prison records reflect Ortiz's association in prison with a "disruptive group" known as "2-5," which is also referenced in Ortiz's prison records as a gang. On May 12, 2011 a correctional officer found a piece of paper with a note from a validated member of 2-5 in Ortiz's belongings. The note contained contact information for the 2-5 member, stating, "Here's my hook up so you can get at me when I leave this place. I'll do whatever I can for you." The gang investigator who authored the report concluded the note was "indicative of '2-5' gang activity," and stated Ortiz, by retaining the note and contact information, was "demonstrating his association with a validated member of the '2-5' disruptive group." The investigator recommended the document be used as one source for validating Ortiz as an "associate" of 2-5. However, at a May 20, 2011 program review, a prison classification committee found insufficient evidence to validate Ortiz as a member or associate of any disruptive group.<sup>4</sup>

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<sup>4</sup> The California Department of Corrections and Rehabilitation (CDCR) defines prison gangs, "disruptive groups," and street gangs as "security threat groups" (STG's). (Cal. Code Regs., tit. 15, §§ 3000, 3378.1, subd. (a)(1).) An inmate may only be classified as a member or associate of an STG if there are at three independent sources of validation. (Cal. Code Regs., tit. 15, § 3378.2, subd. (b); *In re Morales* (2013) 212 Cal.App.4th 1410, 1415 ["The regulations require three independent 'source items' to prove gang membership or association, and provide the inmate with an opportunity to rebut the evidence."].)

E. *Ortiz's Rehabilitative Efforts and Release Plans*

While incarcerated, Ortiz participated in education classes, vocational classes, job training, anger management classes, and a "Criminal and Gang Member Anonymous Group." Ortiz submitted letters from his family stating he would have a home and a job in Mexico upon his release.

F. *Proposition 47 Petition*

On April 27, 2015 Ortiz filed a petition to recall his sentence and reclassify the convictions as misdemeanors under Proposition 47. The superior court issued an order to show cause on the petition. In their opposition to Ortiz's petition, the People conceded Ortiz met the eligibility requirements under Proposition 47, but argued his release would pose an unreasonable risk of danger to public safety. The People and Ortiz filed extensive exhibits in their pleadings and at the March 9, 2016 suitability hearing.<sup>5</sup> At the hearing the superior court admitted the exhibits, heard argument from counsel, and took the matter under submission.

G. *The Superior Court's Ruling*

On March 17, 2017 the superior court issued a 13-page memorandum of decision denying Ortiz's petition on the basis that resentencing Ortiz would pose an unreasonable risk of

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<sup>5</sup> The People's exhibits were filed under seal. Because the documents were not included in the appellate record, on our own motion we augment the record to include the sealed documents filed by the People on July 1, 2015 in support of their opposition to the petition. (See Cal. Rules of Court, rule 8.155(a)(1)(A).)

danger to public safety within the meaning of section 1170.18, subdivision (c). The superior court set forth the standard under section 1170.18 defining an “unreasonable risk of danger to public safety” as “an unreasonable risk that the petitioner will commit one of the enumerated offenses specified in section 667, subdivision (e)(2)(C)(iv)—which lists serious and violent felonies that are often referred to as ‘super strikes.’”

The court outlined Ortiz’s criminal history, which it acknowledged was “remote,” but noted Ortiz had “a history of being unable to comply with the conditions of his parole” and had spent almost all his time in custody or on parole supervision since his first offense in 1988. The court highlighted Ortiz’s involvement in gangs before and during his incarceration, describing gangs as “a cancer on society . . . [that] jeopardize public safety as they promote violence, drug trafficking, and extortion, and create substantial risks in prisons, jails, and local communities.” The court noted that Ortiz “was a gang member both as a free member of society as well as while incarcerated. In essence, [Ortiz’s] willingness to continually participate in the STG II gang known as the ‘2-5s’ is indicative of his current risk of danger to public safety.” Further, Ortiz’s “[i]nvolvement in prison and street gangs necessarily means being involved in the commission or attempted commission of at least . . . some [of] the super strike offenses . . . .”

Of Ortiz’s 14 RVR’s, the court highlighted Ortiz’s violent commission of a battery in 2005 and his recent rules violations, including the 2014 battery on an inmate, possession of inmate-manufactured alcohol, and possession of drug paraphernalia, stating those violations “constitute powerful evidence of his current willingness to engage in serious rule-breaking behavior

and are probative of recidivist tendencies and a danger to public safety.”

The court also noted the lack of any substance abuse treatment in custody and that, despite completing 350 hours of conflict and anger management in 2008, Ortiz battered his cellmate in 2014. The court concluded as to Ortiz’s prison record, “[T]he court is not convinced that [Ortiz] has sufficiently programmed such that he is unlikely to engage in future super-strike behavior.”

The court found Ortiz’s post-release plans “questionable at best” and highlighted that Ortiz had never followed through on previous post-release plans, instead using 13 different names and six different dates of birth. Although the court found Ortiz’s age and his classification score of 36<sup>6</sup> weighed in favor of

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<sup>6</sup> “Under the applicable regulations, ‘All persons entering the [CDCR] penal system are given a classification score which determines an inmate’s security level. Based on this score, an inmate will be given a designation ranging from Level I—reserved for the lowest security risk prisoner—to Level IV—reserved for the highest security risk prisoner. The score is arrived at by tabulating points that are based on an array of objective factors which include, among other things, length of sentence, nature of the crime committed, criminal history, employment history, military service, marital status, age, prior escape attempts, and prior incarceration behavior.’ [Citations.] Gang activity is also considered in determining an inmate’s security level classification.” (*In re Morales, supra*, 212 Cal.App.4th at p. 1413.) “A higher score means the inmate is considered a higher security risk and would be assigned to a correspondingly higher security facility; a lower score means the inmate is considered a lower security risk and would be assigned to a correspondingly lower security facility.” (*In re Nguyen*

resentencing, it found those factors were outweighed by the other statutory factors, especially given that Ortiz had “continued violence and lack of substance abuse rehabilitation well into his forties.” The court concluded, “[T]he totality of the evidence contained in the record demonstrates that resentencing [Ortiz] at this time would pose an unreasonable risk of danger to public safety pursuant to the definition set forth in section 1170.18, subdivision (c) due to his criminal history, disciplinary record, insufficient rehabilitative programming, continued gang participation, and inadequate re-entry plans.”

## DISCUSSION

### A. *Standard of Review*

We review the denial of a Proposition 47 petition on the ground of dangerousness for an abuse of discretion because section 1170.18, subdivision (b), confers discretion on trial courts to determine whether an inmate is dangerous. (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 242-243 (*Jefferson*); *People v. Hall* (2016) 247 Cal.App.4th 1255, 1263-1264 (*Hall*).) “Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion “must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]” [Citation.] The abuse of discretion standard ‘involves abundant deference’ to the court’s ruling.” (*Jefferson*, at pp. 242-243; see *People v. Miracle* (2018) 6 Cal.5th 318, 346-347 [“An abuse of discretion will be

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(2011) 195 Cal.App.4th 1020, 1024, fn. 1; see Cal. Code Regs., tit. 15, § 3375 et seq.)

“established by ‘a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’”].)

B. *Proposition 47: The Safe Neighborhoods and Schools Act*

“Approved by voters in 2014, Proposition 47 . . . reduces many common theft- and drug-related offenses from felonies to misdemeanors for offenders who do not have prior convictions for specified violent or serious offenses. The measure also permits eligible defendants who were serving felony sentences as of Proposition 47’s effective date to obtain the benefit of these changes by petitioning for resentencing.” (*People v. Dehoyos* (2018) 4 Cal.5th 594, 597; accord, *People v. Page* (2017) 3 Cal.5th 1175, 1179.) Convictions for petty theft with a prior conviction (§ 666) and possession of a controlled substance (Health & Saf. Code, § 11377) qualify for reclassification under Proposition 47. (§ 1170.18, subds. (a) and (b); *People v. Valencia* (2017) 3 Cal.5th 347, 355 (*Valencia*).)

If the court determines the petitioner meets the criteria for reclassification of his or her conviction as a misdemeanor, the court “must recall the felony sentence and resentence the petitioner based on the new classification of the offense as a misdemeanor, ‘unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’” (*Valencia, supra*, 3 Cal.5th at p. 355; see § 1170.18, subd. (b).) An unreasonable risk of danger to public safety is defined in section 1170.18, subdivision (c), as “an unreasonable risk that the petitioner will commit a new violent felony” listed in section 667, subdivision (e)(2)(C)(iv), commonly referred to as “super strikes,” including any homicide or

attempted homicide offense, solicitation to commit murder, assault with a machine gun on a peace officer or firefighter, specified sex offenses, and any serious or violent felony offense punishable by life imprisonment or death.

In exercising its discretion to determine whether a petitioner presents an unreasonable risk of danger, the resentencing court may consider “(1) the petitioner’s ‘criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes’; (2) his or her ‘disciplinary record and record of rehabilitation while incarcerated’; and (3) ‘[a]ny other evidence’ the court deems relevant. (§ 1170.18, subd. (b)(1)-(3).)” (*Valencia, supra*, 3 Cal.5th at p. 355.) The People have the burden to prove by a preponderance of the evidence that a petitioner presents an unreasonable risk of danger to public safety. (*People v. Frierson* (2017) 4 Cal.5th 225, 239 [“several Courts of Appeal have properly concluded that ‘[t]he facts upon which the court’s finding of unreasonable risk is based must be proven by the People by a preponderance of the evidence’”]; *Jefferson, supra*, 1 Cal.App.5th at p. 241 [“the proper standard of proof on a dangerousness finding is the default standard of proof by a preponderance of the evidence”].)

C. *The Superior Court Applied the Correct Legal Standard*

Ortiz contends the superior court incorrectly applied the standard for a court’s review of parole decisions to its determination whether Ortiz posed an unreasonable risk of danger under Proposition 47. The record is to the contrary. It is true that, in discussing the statutory factors for determining

dangerousness under Proposition 47, the superior court cited cases involving suitability for parole, including *In re Lawrence* (2008) 44 Cal.4th 1181, 1214 (aggravated nature of the commitment offense only supports finding of current dangerousness if supported by indication of dangerousness in inmate's pre- or post-incarceration history, current demeanor, or mental state), *In re Rozzo* (2009) 172 Cal.App.4th 40, 60 (determination of suitability for parole must take into account inmate's criminal history, conduct in prison, and mental state in addition to commitment offense), and *In re Bettencourt* (2007) 156 Cal.App.4th 780, 805 (serious misconduct in custody may support determination of unsuitability for parole).

However, this does not mean the superior court applied an incorrect legal standard, but rather, that the court considered factors common to parole review decisions and determination of suitability for reclassification under Proposition 47. (See § 1170.18, subd. (b) [court may consider petitioner's "criminal conviction history," "disciplinary record and record of rehabilitation while incarcerated," and other evidence the court deems relevant].)

Further, the superior court in its memorandum of decision cited to the standard under section 1170.18, subdivision (c), that an inmate "shall" have his or her sentence recalled "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." The court acknowledged that "an unreasonable risk of danger to public safety means an unreasonable risk that the petitioner will commit one of the enumerated offenses specified in section 667, subdivision (e)(2)(C)(iv)—which lists serious and violent felonies that are often referred to as 'super strikes.'" In

that context, the court found that Ortiz “at this time does pose an unreasonable risk of danger to public safety,” and denied the petition.

D. *The Superior Court Did Not Abuse Its Discretion in Denying Ortiz’s Proposition 47 Petition*

In making its determination that Ortiz posed an unreasonable risk of danger to public safety, the superior court considered the factors enumerated in section 1170.18, subdivision (b), made findings as to each factor, and concluded the court was “not convinced that [Ortiz] has sufficiently programmed such that he is unlikely to engage in future super-strike behavior.” In reaching this conclusion, the court considered Ortiz’s two prior violent felony convictions, as well as his history of reoffending while on parole, gang participation, numerous violations in prison, failure to participate in sufficient rehabilitative programming, and unreliable post-release plans.

Ortiz contends substantial evidence does not support the superior court’s finding of dangerousness because the superior court relied heavily on Ortiz’s gang membership but there was insufficient evidence he was a gang member prior to and in prison. We conclude otherwise. As the superior court noted, Ortiz had admitted previous membership in the Gardena 13 gang, had multiple tattoos reflecting allegiance to the gang, and stated in prison that he wanted “out of the gang.” A July 2014 threat assessment continued to list Ortiz’s gang affiliation as Gardena 13. While in prison, Ortiz saved a note from a validated member of the disruptive group 2-5 stating the member would “do whatever I can for you” upon Ortiz’s release. A gang investigator concluded Ortiz, by retaining the note, was

“demonstrating his association with a validated member of the ‘2-5’ disruptive group.” In addition, there was evidence that in 2014 Ortiz beat his cellmate so Ortiz could move one of his “homeboys” into the cell. The report from the incident described Ortiz as a “participant of the STG II gang known as [the] ‘25s.’” Contrary to Ortiz’s contention, the superior court properly considered evidence of Ortiz’s affiliation with a prison disruptive group despite the lack of three sources of validation necessary to validate him as a 2-5 member under the CDCR regulations.

In addition, as the superior court noted, Ortiz had a history of reoffending and spending his time in custody or on parole supervision since his first offense in 1988. In 1991 he was violated on parole for grand theft auto and, after his release from custody, he violated his parole again in November 1991 by committing a burglary. Following his 1993 robbery conviction, he was convicted in 1994 of receiving stolen property and was sentenced to 32 months in prison. Then, in 1998 Ortiz was violated on his parole for violent attacks on his ex-girlfriend and her neighbors. According to the report, Ortiz violently beat his ex-girlfriend, then placed his hands over her mouth and nose in an attempt to suffocate her. After she screamed for help, Ortiz tied her up and gagged her. He next broke into the neighbors’ home and used a knife to attempt to take their vehicle. When one of the neighbors retrieved a firearm, Ortiz violently took the firearm and held the couple at gunpoint. Ortiz was violated on his parole and returned to custody for 12 months. He was out of custody for a short time before being arrested on August 1, 1999 for the offenses leading to his current incarceration.

While in prison, Ortiz committed two violent batteries. In 2005 Ortiz used a triple-bladed razor to slash another inmate,

causing multiple lacerations on his left earlobe and behind the ear, requiring 19 stitches. The attack ended only because correctional officers broke up the fight. Three years later Ortiz was issued an RVR for having a razor in his cell. After Ortiz completed 350 hours of conflict and anger management, in 2014 he beat his cellmate, hitting and kicking him in the head, to get him moved out of his cell so his “homeboy” could move in. The superior court also considered Ortiz’s other RVR’s, which showed his continued drug addiction (2011 possession of a homemade needle and syringe) and continued rule-breaking, for example, possession of inmate-manufactured alcohol in 2015.

The superior court did not abuse its discretion in concluding, based on Ortiz’s robbery convictions, repeated violations of parole, attack on his ex-girlfriend and her neighbors, two violent attacks in prison and other RVR’s, gang affiliation, and insufficient rehabilitative programming that Ortiz was likely to commit a super strike if he were released. (See *Jefferson, supra*, 1 Cal.App.5th at pp. 242-243 [superior court did not abuse its discretion in denying petitioner’s Proposition 47 petition where petitioner had a violent robbery conviction, numerous parole violations, participation in gang-related melees in prison, sworn loyalty to the gang, and rule violation for threatening a correctional officer]; *Hall, supra*, 247 Cal.App.4th at pp. 1264-1267 [superior court did not abuse its discretion in finding petitioner was likely to commit a super strike where petitioner had no prison violations but had a 20-year history of serious criminal conduct, with the most recent offenses involving a threat to kill the victim, and one year later a threat to stab the victim if she did not give him her purse].)

## **DISPOSITION**

The order denying Ortiz's Proposition 47 petition is affirmed.

FEUER, J.

WE CONCUR:

ZELON, Acting P. J.

SEGAL, J.